Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting the Availability of	)	MB Docket No. 16-41
Diverse and Independent	)	
Sources of Video Programming	)	
	)	
	)	

COMMENTS OF beIN SPORTS, LLC

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I. INTRODUCTION AND SUMMARY.

beIN SPORTS, LLC ("beIN") hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in this docket. beIN is an independent programmer not owned or controlled by, or under common ownership with, pay-TV providers, broadcasters, or major motion picture studios. In August of 2012, beIN launched two channels, "beIN SPORTS" and "beIN SPORTS en Español," plus a live streaming and on-demand service now branded, "beIN SPORTS CONNECT." beIN offers viewers popular sports content and sports related entertainment content across both channels and on beIN SPORTS CONNECT. A cornerstone of beIN is its unrivaled live soccer coverage, which includes live matches from La Liga, Serie A, Ligue 1 and CONMEBOL/ CONCACAF/CAF World Cup Qualifiers, as well as news and in-depth analysis of all the top soccer leagues from around the world. In addition to soccer, beIN serves as a haven to fans of motorsports, tennis, rugby, volleyball, Olympic, and boxing, among others. Both channels are currently available to over eighty percent of pay-TV consumers, carried on tiers delivered to just over thirty percent of pay-TV consumers.

This proceeding affords the Commission an opportunity to put into practice what President Donald Trump and his supporters within the independent programming community have described as "too much power in the hands of too few" throughout the video market. Recent consolidation of the pay-TV market into four dominant firms controlling roughly seventy five percent of all pay-TV households gives each of the major distributors leverage to extract debilitating terms and conditions from independent programmers that only serve to reduce competition and harm consumers. Such terms not only harm competition among content providers by undermining programming diversity and independent programmers like beIN, they also impact competing distributors' ability to serve consumers, particularly those in rural areas.

The concentration of market power occurs not only on the distribution side of the market (Pay-TV companies) but also on the content side, as massive media conglomerates exercise greater leverage at the expense of smaller, independent content creators. The Commission should address the anti-competitive effects of large, conglomerate programmers bundling multiple channels and demanding carriage of their entire suite of services at high rates. These actions undermine competition in the video market by crowding out bandwidth and resources that otherwise could be available to independent programmers, ultimately to the detriment of consumers.

The Commission should adopt its proposed rules prohibiting contractual Most Favored Nation ("MFN") clauses that are structured as "unconditional," and unreasonable Alternative Distribution Method ("ADM") clauses in pay-TV providers' agreements with independent programmers. As the Commission correctly concludes, such unconditional MFN clauses serve no purpose other than granting a distributor all of the benefits of another carrier's deal without any reciprocal benefit to the programmer Unconditional MFNs in beIN's agreements with major distributors have curtailed beIN's ability to enter innovative business arrangements. ADM clauses hinder beIN's and other independent programmers' competitiveness in a rapidly changing, vibrant marketplace. By contrast, the non-independent major programmers apparently are free to innovate. Ultimately, the consumer suffers because independent programmers' content is significantly less available than it could be, thereby restricting video choice and competition.

The Commission should define an "independent" programmer as one unaffiliated with a MVPD, broadcaster, or major motion picture studio (i.e., the top motion picture studios that are members of the Motion Picture Association of America). Such a definition would provide an adequate delineation between programmers that possess negotiation leverage by virtue of shared ownership with powerful media properties and those, like beIN, that do not.

II. PRESIDENT DONALD TRUMP'S CRITICISMS OF THE VIDEO MARKET SHOULD COMPEL THE COMMISSION TO FOSTER INDEPENDENT PROGRAMMERS.

The pleading cycle in this docket commenced at the end of the Obama Administration and will conclude at the beginning of the Trump Administration. Despite the change in leadership at the Commission as well as the White House, however, the fundamental premise of a broken video market that harms consumers remains an urgent reality. Perhaps more than any other presidential candidate in modern history, President Donald Trump made media concentration a central issue of his campaign for President, underscoring the importance of this proceeding and the issues raised herein.

Throughout the course of his campaign for the White House, President Trump identified the threat to consumers and democracy posed by consolidation in the distribution and programming segments of the video market. His campaign website said that the

> "oligopolistic realignment of the American media along ideological and corporate lines is destroying an American democracy that depends on a free flow of information and freedom of thought" and promised that "Donald Trump will [stand] against this trend and . . . for the American people."[1]

President Trump repeatedly pointed to the consolidation in the video industry, and particularly the vertical integration of distribution and content providers, as harmful to American democracy and competition generally. He asserted, for example, that the combined Comcast/NBC-Universal

> "concentrates far too much power in one massive entity that is trying to tell the voters what to think and what to do" and that these types of media conglomerates "destroy democracy. . . . They're trying to poison the minds of the American voter."[2]

Trump described the proposed acquisition of Time Warner, Inc. by AT&T as "an example of the power structure [he is] fighting" and again referred to the accumulation of market power, stating that the proposed transaction would mean "too much power concentrated in the hands of too few."[3]

Supporters of President Trump want the new Administration to follow through on his campaign promises to address the outsized influence of major video players in a highly concentrated market. Christopher Ruddy, CEO of the politically Conservative independent programmer, Newsmax, in an article about a phone call he received from President-Elect Trump after the election, wrote that media diversity should be one of the five cornerstones of Trump's presidency. Ruddy said that "the near monolithic media machine that opposed Trump in the

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[1] Peter Navarro, Senior Economic Advisor, Statement on Monopoly Power of New Media Conglomerates, Trump-Pence 2016 (October 23, 2016) https://www.donaldjtrump.com/press-releases/statement-on-monopoly-power-of-new-media-conglomerates.
[2] Donald Trump Speeches & Rallies, FULL EVENT: Donald Trump Foreign Policy Speech In Gettysburg, PA (10/22/2016) First 100 Day Plan, YouTube, (Oct. 22, 2016), https://www.youtube.com/watch?v=_R4L-Os2LSI at 9:01.
[3] Donald Trump Speeches & Rallies, FULL EVENT: Donald Trump Foreign Policy Speech In Gettysburg, PA (10/22/2016) First 100 Day Plan, YouTube, (Oct. 22, 2016), https://www.youtube.com/watch?v=_R4L-Os2LSI at 8:09.

recent election is antithetical to the vision of the Founding Fathers' concept of a free press … [and that Trump] should take steps to make sure huge conglomerates do not dominate and control the country's major media."[4]

This proceeding provides the incoming Commission an opportunity to put into action the campaign positions articulated by President Trump. By prohibiting the most egregious abuses of market power against independent programmers, the Commission can push back on the "huge conglomerates" and "too much power in the hands of too few" evident in the current video market.

III. THE MARKET POWER ABUSES OF LARGE PAY-TV DISTRIBUTORS IMPACT BEIN SPORTS' ABILITY TO COMPETE FOR SPORTS VIEWERS.

A. Major Pay-TV Distributors Possess Enough Market Power to Extract One-Sided Terms from beIN SPORTS.

The Commission correctly concludes that the behavior of large Pay-TV distributors thwarts competition in video programming, reasoning that despite expansive trends in the video marketplace, such as Online Video Distributors ("OVDs") and wireless-based services, "the record indicates that certain participants in the video marketplace, particularly independent content producers and OVDs, are facing significant challenges."[5] beIN SPORTS agrees that certain MVPDs "have used their bargaining leverage vis-à-vis independent programmers" to impose contract clauses, including the unconditional MFN and unreasonable ADM provisions, that "hamper the ability of programmers to experiment with online distribution [and] make it challenging for programmers to achieve a profitable level of carriage, or to secure carriage

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[4] Christopher Ruddy, The President-elect Calls, Newsmax (November 21, 2016) http://www.newsmax.com/ChristopherRuddy/president-elect-trump-economy-obamacare-military/2016/11/21/id/759976/.

[5] *Promoting the Availability of Diverse and Independent Sources of Independent Programming*, Notice of Proposed Rulemaking,, FCC No. 16-129, MB Docket No. 16-41 (rel. Sept. 29, 2016) (hereafter "Notice") ¶ 6.

without contracting away their freedom to present content to a broader audience via the Internet."[6] beIN has experienced all of these market dynamics.

All of the anti-competitive behavior in the video market begins with concentrated market power in the "hands of too few," as President Trump put it. The recent consolidation of pay-TV distribution into four dominant companies –Comcast/NBCU, Charter, AT&T, and DISH Network—means that any one of those distributors is in a position to impact materially and adversely the competitiveness of beIN. The four largest distributors collectively represent about 75% of pay-TV households; the two largest comprise almost 50% of that market.[7] beIN earns revenue through per-subscriber fees and advertising; if not carried on a cable, "telco," or satellite platform (i.e., an MVPD), revenues are limited to the nascent online video market where there are limited opportunities. Therefore, given the pay-TV distribution market share of each of the top four distributors, losing access to any one of those player's subscriber base is sufficient to materially impact beIN's business.

The distributors understand the leverage they have over independent programmers and extract onerous contractual terms accordingly. In beIN's negotiations with distributors, the threat of removing beIN's service gives the distributor significant leverage, regardless of proven consumer demand for beIN's programming. Distributors' bargaining power in traditional, linear pay-TV video is what gives them the ability to restrict beIN's distribution under innovative

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[6] Notice at ¶ 7.

[7] At the completion of AT&T's acquisition of DirecTV, the company's video subscriber tally reached 26.3 million customers, giving them a 26% market share. As second largest, Comcast has 22.3 million subscribers and 22% of the pay-TV market and with 13.9 million subscribers DISH maintains 14%. Charter (after acquiring Time-Warner Cable and Bright House Networks) hold 17.2 million subscribers, or about 17% of the market. Percentages are based on a total MVPD market size of 99.4M. See Jon Lafayette, "Nielsen" Pay-TV Households Dip Below 100M" (March 24, 2016) (available at http://www.broadcastingcable.com/news/currency/nielsen-pay-tv-homes-down-07-september/159108).

business terms or on new, emerging technological platforms, such as "Over-the-Top" (OTT) services and direct-to-consumer distribution online (see MFN and ADM sections).

This bargaining dynamic is reflected in economic literature. Former Commission Chief Economist Gregory S. Crawford recently observed that the increased consolidation in the pay-TV market following a series of major mergers, while offering economies of scale and other benefits, increased "market power" and "disadvantage[ed] smaller channels and/or distributors."[8]

B. Major distributors' abuse of market power against independent sports programmers harms competition and undermines the quality, variety, and price of sports programming.

Sports fans do not enjoy the benefits of true competition among sports programmers competing on a level playing field. Although multiple sports channels exist today, not all sports programmers are able to reach their desired audience due to restrictive terms and conditions imposed by distributors. For example, beIN often does not receive distribution on the most widely available programming tier, in contrast to NBC Sports, CBS Sports, Fox Sports, Univision Deportes and ESPN, all under common ownership with broadcast networks and available in more homes served by a typical top-four pay-TV distributor as a result of their broadcast leverage.

This distribution dichotomy between the independent and non-independent sports networks extends to beIN's ability to acquire sports rights. beIN must acquire from international sports leagues and teams the right to distribute televised games and events throughout the U.S. This means that beIN must compete against large, conglomerate non-independent programmers such as NBC Sports, Fox Sports, and ESPN, in a bidding war to acquire U.S. distribution rights.

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[8] *See* Gregory S. Crawford, *The Economics of Television and Online Video Markets*, University of Zurich Working Paper Series, Working Paper No. 197, at 29 (2015).

Even if beIN matches every bid dollar for dollar, a major conglomerate sports programmer can argue to a league that it offers better distribution to more potential viewers. Moreover, in the case of Comcast/NBCU, this is exacerbated by the fact that Comcast—a major distributor upon which beIN relies to reach audiences—owns sports networks that in turn enjoy superior distribution on Comcast than beIN's.

A similar dynamic occurs with respect to advertising. In beIN's experience, major general market advertisers purchase inventory through ad-buying agencies which, in turn, will not even consider purchasing advertising on a network that does not have a threshold level of distribution, typically 50 million homes passed. Major Pay-TV companies tend to make beIN's English-language network available only as part of a sports package, which usually is distributed to about 20% of the MVPD's total subscribership. By contrast, beIN's Spanish-language network generally achieves about 90% penetration to the relevant audience segment. beIN has considerably more trouble selling advertising on its English network than it does on its Spanish network. Thus, the restrictive distribution practices of major Pay-TV companies towards an independent sports programmer like beIN curtail the network's ability to earn advertising revenue, relative to its non-independent competitors.

beIN's experience as an independent sports programmer corroborates comments made by the Pac-12 network in this docket. Although it offers exclusive coverage of a major collegiate conference, Pac-12 concluded that despite consumer demand for its content, the current market structure is flawed. Large MVPDs, according to Pac-12, "clearly have enough market power to negatively affect the ability of independent programmers to obtain carriage" and to obtain one-sided, onerous terms and conditions.[9]

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[9] Pac-12 NOI Reply Comments at 5.

C. Major distributors' treatment of independent programmers harms horizontal competition in video distribution and further undermines beIN's ability to reach sports fans.

The record in this proceeding demonstrates that undermining independent programmers' ability to compete also thwarts horizontal competition among distributors. As ACA explained, a number of small cable operators are leaving the video market altogether.[10] T-Mobile, a nascent video distributor in the wireless space, where beIN would be able to reach new audiences if permitted by MVPDs to do so,[11] observed that "new entrants in the marketplace pay significantly more for access to programming in comparison to large distributors" and urged the Commission to assess "whether new entrants to the video marketplace are unable to gain access to programming on terms that will allow them to compete effectively with larger distributors . . .."[12]

By undermining the competitiveness of smaller and emerging distribution platforms by restricting those would-be competitors' access to programming, the major pay-TV distributors solidify their dominant positions in the distribution market and ultimately reduce beIN's distribution options. None of this is good for underserved sports fans (e.g. those living in rural areas served by small cable operators, fans who want to watch sports on wireless and other emerging platforms and fans of specialty sports such as soccer and motorsports).

IV. THE COMMISSION SHOULD ADDRESS BUNDLING ABUSES BY LARGE CONGLOMERATE PROGRAMMERS SUCH THAT CONSUMERS MAY BENEFIT FROM ACCESS TO INDEPENDENT PROGRAMMERS.

[10] ACA NOI Comments at 9. "A growing number of small cable operators have begun to transition to a broadband-centric model. Indeed, a handful have abandoned video altogether. The executive of one such operator explained his choice simply: '[T]he TV model is broken.'" ACA NOI Comments at 10. See also ITTA NOI Comments at 2 ("Entering the market as the third, fourth, or fifth competitor is not easy. . . .").

[11] *See* infra [Section]

[12] T-Mobile NOI Reply Comments at 8.

The bundling practices of large programmers harm competition in programming content. In our experience negotiating with major distributors, we are told that the bundling demands of conglomerate programmers, such as NBC/Universal, 21st Century Fox, and Disney –all of which have sports programming services-- means that the distributor cannot or will not pay us a comparable fee or offer comparable distribution terms and conditions. Independent programmers widely assert on the record that the bundling practices of major programmers harm consumers and merit Commission action.[13] beIN agrees.

The bundling practices of large programmers harm competition in the video distribution market. As stated above, anything that undermines competition among distributors harms beIN's ability to reach the widest possible audience. As T-Mobile pointed out, such practices "might limit its ability to offer innovative program services tailored to what customers really want…."[14] They also often lead to independent services like beIN SPORTS being crowded out of channel capacity on smaller cable systems.[15] Ultimately, the consumer suffers by not having access to the particular content that best suits her. For example, a soccer or rugby fan living in a rural community served by a small cable operator probably would enjoy the depth and variety of those

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[13] *See* Ride Television Network NOI Comments at 3 ("The practice of bundling highly rated and sought after marquee channels with numerous less desirable channels has led to marketplace where bandwidth is at a premium, highly penetrated basic packages are filled, and programming dollars are consumed, leaving little room for independent networks"). See also The Blaze NOI Comments at 9 ("Forced bundling drives up the cost of linear television to MVPDs and ultimately to consumers and challenges the price elasticity of pay-TV. As consumers resist the upward price pressure created by wholesale bundling, MVPDs are forced to eliminate other programming options to cut costs. Independent programmers, without market leverage, bear the disproportional brunt of these cost cutting measures by being denied carriage, forced to accept carriage on less than market rates and terms, or dropped altogether from channel line ups").

[14] T-Mobile NOI Reply Comments at 7.

[15] *See* ITTA NOI Comments at 5 ("Smaller and new entrant MVPDs are forced to purchase the bundled offering, which limits the channel capacity and resources they have available for the carriage of diverse, independent sources of video programming. Moreover, forced bundling impedes the ability of new entrant MVPDs to distinguish their services from incumbents by offering diverse, independently-produced content in lieu of programming foisted on them by the large media entities").

sports offered by beIN, but she cannot enjoy the games because her cable operator is unable to carry our network.[16]

The Commission must address conglomerate programmers' bundling practices as part of any effort to improve competition in the video market. A failure to do so would eviscerate any other reforms adopted in this proceeding. The leverage of large, conglomerate, non-independent programming networks harms the ability of independent programmers like beIN to secure distribution on favorable terms. Combined with the aforementioned harms to our competitiveness stemming from major distributors' abuse of market power in negotiating distribution agreements with us, independent networks like beIN are put in a squeeze. Like a goalie facing two forward wings who have broken past the defenders, we face a double threat. Commission action on behalf of sports fans and other consumers is warranted.

V. THE COMMISSION SHOULD ADOPT ITS PROPOSED RULES PROHIBITING UNCONDITIONAL MFNs AND UNREASONABLE ADMs, AND EXCLUDE MAJOR PROGRAMMERS WITH SIGNIFCANT BARGAINING LEVERAGE FROM THE DEFINITION OF "INDEPENDENT" PROGRAMMERS.

A. The Commission correctly concludes that unconditional MFNs serve no market-based purpose.

beIN supports the Commission's tentative conclusion that the "potential harms to competition, diversity, and innovation resulting from unconditional MFN provisions outweigh any potential public interest benefits."[17] We agree with the Commission's finding that "unconditional MFN provisions entitle an MVPD to the most favorable terms granted to other

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[16] Accord, ACA NOI Comments at 20 ("The loss of diversity caused by forced bundling sometimes cuts especially deep for two reasons. First, the bundled channels sometimes duplicate one another. For example, Viacom's Teen-Nick is largely composed of re-aired shows from Viacom's Nickelodeon. Second, the bundled programming often fails to serve the particular needs of the communities served by the small cable operator. Many ACA members, for example, serve rural areas...").

[17] Notice at ¶ 20.

distributors without obligating the MVPD to provide the same or equivalent consideration in exchange for those terms" and therefore "appear designed to discourage or foreclose the wider distribution of video content on online platforms."[18]

As beIN explained earlier in this proceeding,[19] MFN clauses give a Pay-TV distributor the right to receive the best rates, terms, and conditions negotiated between a given programmer and any other video platform, often without the requirement to provide value in exchange. MFNs also may severely restrict the conditions that can serve as the basis for the best rates and terms. MFNs therefore impose costs on programmers without providing incremental benefits, limiting the programmers' ability to expand distribution and revenue opportunities, while curtailing innovative business arrangements. They operate to the sole benefit of the distributor, which automatically receives a discount in license fees or improvement in non-economic benefits any time the programmer enters an agreement with another distributor on better terms.

Regardless of what other value the independent network received in exchange for a lower rate, such as better penetration, channel placement, promotion, resolution (HD or SD), or any other parameter, the MVPD holding the MFN is entitled to the lowest rate paid by the programmer. This means that the MVPD receives something of value (a lower rate) without having to provide anything of value, such as wider distribution to its subscribers.

MFNs in beIN's agreements with major distributors have curtailed beIN's ability to enter innovative business arrangements. beIN has been approached by emerging, OTT video distributors with offers of carriage at a lower fee than that paid by the major MVPDs, and distribution on smaller, "skinny bundles" of channel packages. This would require beIN, however, to offer that same, lower per-subscriber fee to its existing Pay-TV distributors, thereby

[18] Notice at ¶ 19.
[19] *See generally* NOI Reply Comments.

reducing a key source of revenue. No rational programmer would accept such a trade-off, regardless of the importance of the emerging market for OTT video services. This ultimately tends to force the independent programmer to stay in its lane of traditional pay-TV, foregoing opportunities to promote its content to new audiences and grow new revenue streams.

Similarly, MFNs have thwarted beIN's ability to expand distribution on other traditional MVPD platforms. Some Pay-TV companies have offered to carry beIN very broadly, but on a reduced license-fee basis. As in the example of the OTT provider, the independent network often cannot accept such an offer because doing so would force a rate reduction across all platforms operating under an MFN.

B. The Commission correctly concludes that unreasonable ADMs harm independent programmers' ability to compete in the emerging online video space.

The Commission accurately concludes that "certain restrictive ADM provisions have no discernibly pro-competitive justifications and have an adverse impact on the provision of diverse programming sources to consumers" including, as the Department of Justice found, "lower-quality services, fewer consumer choices, and higher prices."[20] A "reasonable" ADM clause would allow a Pay-TV distributor to recuperate its investment in programming. As beIN explained in prior filings,[21] against the backdrop of rapid changes in the way consumers want to watch video on myriad platforms, Pay-TV distributors logically want to protect their "investment in programming"[22] such that their subscribers who pay a monthly fee to receive a benefit for that payment. If the identical video content for which the subscriber pays a cable, telco, or satellite provider were available without charge on the Internet, the MVPD would lose subscribers. Some

[20] Notice at ¶ 23 (citing DOJ's Charter/Time Warner Cable Competitive Impact Statement at 14).
[21] *See generally* beIN NOI Reply Comments.
[22] AT&T NOI Comments at 13.

restrictions on programmers' distribution of content on alternative platforms, such as "authentication" requirements, therefore make sense.

The ADM clauses that only serve to undermine an independent programmer relative to non-independent programmers, however, are "unreasonable" in that, as the Commission states, they result in reduced quality, higher cost, and "fewer consumer choices."[23] Such ADM clauses hinder beIN's and other independent programmers' competitiveness in a rapidly changing, vibrant marketplace. By contrast, the non-independent major programmers apparently are free to innovate. Ultimately, the consumer suffers because independent programmers' content is significantly less available than it could be, thereby restricting video choice and competition.

ADM clauses in our agreements with major distributors have limited our ability to offer programming on the emerging online and mobile platforms where consumers, particularly younger ones, increasingly watch video, precluding consumers from reaching our content where and when they want it. ADM restrictions faced by beIN have included restrictions on the number of hours or types of content beIN may offer online. Some distributors prevent or make difficult beIN's ability to offer games online that do not appear on the linear network.

Conglomerate video programmers with sufficient bargaining leverage apparently are able to negotiate for more flexible ADM terms, placing beIN's programming service at a disadvantage. Clearly broadcast conglomerate programmers do not have the same restrictive ADM provisions as does beIN. Examples from the sports programming context is ESPN's streaming service, "WatchESPN," CBS's "All Access," "Soccer 2 Go" from Fox, "Univision Now" from Univision and NBC's direct to consumer online portal for the Tour de France (collectively, "Broadcast Conglomerate online Direct to Consumer" or "BCDTC"). In each case

[23] Notice at ¶ 23.

users can view live streams of highly desirable content from the broadcast conglomerate and their respective affiliated channels, as well as replays of certain broadcasts and other premium content offerings. All of this content is available regardless of any MVPD subscription.

These BCDTC features fall within the scope of live online streaming often found in the ADM clauses encountered by beIN. Any sports programmer that wants to use streaming relies on the *live* stream because unlike episodic TV shows, viewer interest in sports games after they air is limited. Although beIN also can offer authenticated content online, it faces much more onerous contractual restrictions, which inhibit the expansion of its programming model in keeping with broadcast conglomerates' practices.

All broadcaster-affiliated networks are carried by all of the major MVPDs. And all of the BCDTC online services would violate the typical ADM restrictions encountered by beIN. These non-independent networks benefit from the bargaining leverage enjoyed by broadcaster-affiliated programming services, leverage an independent programmer never can attain. These BCDTC offerings are proof positive that programming diversity is stifled as a result of ADM clauses imposed on independent networks. Thus, the competitive disadvantages of independent programmers are manifested in fewer choices and less innovation online. The American consumer suffers from the resulting lack of robust competition.

C. The Commission should define "independent" programmers as those not affiliated with an MVPD, broadcaster, or major motion picture studio.

The Notice asks how best to define "independent" programmer in order to ensure that any relief is targeted to where it is most needed and refers to a proposal by ITTA to define as "independent" a programmer not affiliated with an MVPD, broadcaster, or movie studio.[24] beIN supports the ITTA definition as an adequate delineation between programmers that possess negotiation leverage by virtue of shared ownership with powerful media properties and those, like beIN, that do not. However, to ensure that the definition accurately reflects differences in bargaining leverage between independent programmers and conglomerates, we recommend that the "movie studio" be defined as any major studio member of the Motion Picture Association of America (i.e., 20th Century Fox, Paramount Pictures, Sony Pictures Entertainment, Universal Studios, Walt Disney Studios and Warner Bros. Entertainment). Some of these studios already are included in a definition that excludes MVPD- or broadcaster-affiliated networks (e.g., 20th Century Fox, Universal Studios, and Walt Disney Studios) but others, such as Paramount Pictures and Warner Bros. Entertainment (unless and until it is acquired by AT&T) target the scope of the definition to ensure that large, conglomerate programmers are not treated as independent networks.

In beIN's experience, the large programmers that already possess sufficient leverage to avoid the most burdensome MFN and ADM clauses are those with shared ownership by MVPDs, broadcasters, and major movie studios. The ITTA definition, as modified above, appropriately would exclude from "independent" the networks owned by NBCU, Disney, 21st Century Fox, CBS, Viacom, and Time Warner. The Commission's originally proposed definition of independent (i.e., not affiliated with an MVPD) would have deemed all of these except NBCU as independent, a flawed outcome.

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[24] Notice at ¶ 17.

D. Chairman Pai's concerns regarding "unintended consequences" of the proposed rules would be answered by addressing the bundling issue.

Chairman Pai in his dissent raises legitimate concerns about the "unintended consequences" of the proposed rules and asks whether the rules might in fact make it harder for independent programmers to gain distribution.[25] Chairman Pai correctly states that MVPDs are under no legal obligation to carry any particular independent programmers and that the MFN/ADM rules might cause MVPDs to drop or enter into exclusive agreements with such programmers.[26] beIN agrees—there are no guarantees for carriage, even if the Commission adopts its proposed rules— yet believes that on balance the rules would be an improvement over the status quo.

First, the proposed rules would help to address some of the bargaining power imbalance between major distributors and independent programmers, and in this sense are necessary--but by no means sufficient--ways to bring better, fairer competition into the market.

Second, by adopting the proposed rules, the Commission would send an unmistakable signal to distributors that the Commission and Trump Administration value competitive programming markets, believe that fostering independent programmers is a means to giving consumers more choice and quality in programming, and that anti-competitive abuses of market power are not viewed favorably.

Moreover, Chairman Pai's concern goes directly to why beIN believes that any effort by the Commission must go beyond the proposed MFN and ADM rules, which target the behavior of distributors, and address the bundling practices of major programmers described herein. The MFN/ADM rules by themselves may in fact leave too many doors open to further abuses and

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[25] See Notice, Dissenting Statement of Commissioner Agit Pai.
[26] Id.

crowding out of independent programmers because the rules only address one form of anti-competitive behavior. Addressing bundling practices would be an improvement over the current proposal.

VI. CONCLUSION

beIN supports the Commission's proposed rules in this docket prohibiting unconditional MFN and unreasonable ADM clauses in affiliation agreements between MVPDs and independent programmers, as defined herein. Consumers ultimately benefit from a vibrant video market; due to consolidation among both distributors and programmers, they currently do not receive all the potential benefits of a truly competitive video market. The Commission's proposed actions would begin to address this imbalance.

Respectfully submitted,

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